

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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THE RODGERS AND HAMMERSTEIN  
ORGANIZATION, on behalf of itself and  
IRVING BERLIN MUSIC COMPANY and  
WILLIAMSON MUSIC CO., FREDDY BEINSTOCK  
individually and d/b/a FREDDY BEINSTOCK  
MUSIC COMPANY, CRITERION MUSIC  
CORPORATION, FRANK MUSIC CORP., JERRY  
LEIBER individually and d/b/a JERRY  
LEIBER MUSIC, MIKE STOLLER individually  
and d/b/a MIKE STOLLER MUSIC, MPL  
COMMUNICATIONS, INC., PEER INTERNATIONAL  
CORPORATION, JULIAN J. ABERBACH d/b/a  
ELVIS PRESLEY MUSIC and GLADYS MUSIC and  
THE SONGWRITERS' GUILD OF AMERICA, INC.  
o/b/o THE ESTATE OF LOUIS ALTER, ALISON  
ALTER ARIES and ADAM ALTER d/b/a LOUIS  
ALTER PUBLICATIONS,

00 Civ. 9322 (JSM)

**MEMORANDUM OPINION  
AND ORDER**

Plaintiffs-Counterclaim Defendants,

-v.-

UMG RECORDINGS, INC. and THE FARM CLUB  
ONLINE, INC.,

Defendants-Counterclaimants.

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JOHN S. MARTIN, Jr., District Judge:

The Rogers and Hammerstein Organization, together with other  
songwriters and music publishers (collectively "Plaintiffs"),  
bring this action for copyright infringement of various musical  
compositions against UMG Recordings, Inc. ("UMG") and The Farm  
Club Online, Inc. ("Farmclub") (collectively "Defendants").  
Defendants now move for summary judgment on the ground that they  
are licenced to make recordings of the musical compositions at  
issue, or in the alternative, for a stay pending resolution of a

Copyright Office proceeding regarding online music services. Plaintiffs cross-move for partial summary judgment. For the reasons set forth below, Defendants' motion is denied in all respects and Plaintiffs' motion is granted.

#### **BACKGROUND**

Plaintiffs are music publishers and songwriters that own or control the copyrights of famous musical compositions such as "White Christmas" and "These Boots are Made for Walking." (Comp. ¶¶ 17 - 25.) UMG is in the business of making and distributing phonorecords<sup>1</sup> through its various music labels, including MCA Records, A&M Records, Polygram Records, and Mercury Records. When making and distributing a phonorecord of a musical composition for which they do not own the copyright, UMG must obtain a license from the copyright owner. See 17 U.S.C. § 115.

Owners of copyrighted musical compositions are required to grant licences under certain circumstances pursuant to the Copyright Act of 1976 (the "Copyright Act"), 17 U.S.C. § 115 ("Section 115"). Section 115(a)(1) provides:

When phonorecords of a non-dramatic musical work have been distributed to the public in the United States

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<sup>1</sup> "'Phonorecords' are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed." 17 U.S.C. § 101.

under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery.

The notice requirements and royalty rates for these "compulsory licences"<sup>2</sup> are also set forth in Section 115 and its related regulations. See id. § 115(b) & (c); 37 C.F.R. §§ 201.18, 255.3(j). Failure to conform to the notice provisions of the statute "forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement." 17 U.S.C. § 115(b)(2).

Section 115 also provides an alternative to the statutory notice and royalty requirements by allowing copyright owners and persons seeking compulsory licenses to negotiate the terms and rates of royalty payments. See id. § 115 (c)(3)(B). The statute also authorizes the use of common agents to negotiate licenses, receive notices, and pay and collect royalty payments. See id.

Most music publishers, including Plaintiffs, employ the Harry Fox Agency, Inc. ("HFA") as their agent to receive notice

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<sup>2</sup> Compulsory licenses for the use of musical compositions are often referred to as "mechanical licenses" because Section 115 allows the act of "mechanically" recording a song on fixed media. See Staggars v. Real Authentic Sound, 77 F. Supp. 2d 57, 64 n.10 (D.D.C. 1999).

of the intention to obtain a compulsory license, and to collect and distribute royalties. Acting on behalf of their clients, HFA waives the statutory notice requirements, negotiates royalty rates at or below the statutory level, and substitutes a quarterly accounting and payment schedule for the monthly schedule prescribed by Section 115.

When a potential licensee notifies HFA of its intention to obtain a compulsory mechanical license, HFA issues a document that sets out the agreed-upon variance of the statutory terms. The parties dispute whether this document is the license itself or merely a confirmation of receipt of notice. The top of the document lists the name and address of the licensee, a licence number, and the date. (Goodman Aff. Ex. 1.) Each document contains the following language: "Refer to the provisions hereof reproduced on reverse side varying terms of compulsory license provision of Copyright Act. The following is supplementary thereto: . . . ." The document then contains information about the musical composition at issue, including a song code, title, writer, publisher, a record number, a format code such as "CD" for compact disc, an artist, and the royalty rate stated as a percentage of the statutory royalty rate. The reverse side of the document contains the following language:

You have advised us, in our capacity as Agent for the Publisher(s) . . . that you wish to obtain a compulsory license to make and to distribute phonorecords of the copyrighted work referred to [on

the front of the document], under the compulsory license provision of Section 115 of the Copyright Act.

Upon doing so, you shall have all the rights which are granted to, and all the obligations which are imposed upon, users of said copyrighted work under the compulsory license provision of the Copyright Act, after phonorecords of the copyrighted work have been distributed to the public in the United States under the authority of the copyright owner by another person, except that with respect to phonorecords thereof made and distributed hereunder:

1. You shall pay royalties and account to us as Agent for and on behalf of said Publishers quarterly, within forty-five days after the end of each calendar quarter, on the basis of phonorecords made and distributed;
2. For such phonorecords made and distributed, the royalty shall be the statutory rate in effect at the time the phonorecord is made, except as otherwise stated [on the front of the document];
3. This compulsory license covers and is limited to one particular recording of said copyrighted work as performed by the artist and on the phonorecord number identified [on the front of the document]; and this compulsory license does not supersede nor in any way affect any prior agreements now in effect respecting phonorecords of said copyrighted work;
4. In the event you fail to account to us and pay royalties as herein provided for, said Publisher(s) or his Agent may give written notice to you that, unless the default is remedied within 30 days from the date of the notice, this compulsory license will be automatically terminated. Such termination shall render either the making or the distribution, or both, of all phonorecords for which royalties have not been paid, actionable as acts of infringement under, and fully subject to the remedies provided by the Copyright Act;
5. You need not serve or file the notice of intention to obtain a compulsory license required by the Copyright Act. . . .

Defendants have submitted HFA documents for each of the musical compositions identified in the complaint. The documents indicate specific record numbers and configurations, such as "CD", "cassette tape" and/or "LP".

On or about October 23, 2000, Farmclub, a subsidiary of UMG, began operating an Internet music service website located at <http://www.farmclub.com>. Farmclub "streams" Universal recordings over the Internet. The source files used for streaming are sound recordings contained on magnetic disks of computer file servers. Although the magnetic computer media on which the server copies reside is not distributed to the public, the Farmclub service allows consumers to access sound recordings of Plaintiffs' copyrighted compositions on demand. Defendants reproduced sound recordings of Plaintiffs' works onto their computer servers in order to offer the Farmclub service. Plaintiffs assert that they never authorized the use of their works on the website and are not being paid any royalties for the use of their works on the Farmclub site.

On or about October 26, 2000, Edward P. Murphy ("Murphy"), the president and Chief Executive Officer of the National Music Publisher's Association, Inc. (the "NMPA"),<sup>3</sup> spoke to Lawrence Kenswil of UMG and informed him that the Internet music service

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<sup>3</sup> The NMPA is the principal trade association of music publishers in the United States. HFA is a wholly-owned subsidiary of NMPA.

was unlicensed and urged UMG to take copyrighted songs for which it had no licenses off the service. (Murphy Decl. ¶ 6.) During a subsequent telephone call with Mr. Zach Horowitz, President of UMG, on November 2, 2000, Murphy repeated that the Internet music service was not licensed and again advised that UMG should remove the musical compositions for which it did not have licenses from the service.

On November 20, 2000, UMG sent a letter to HFA seeking licenses to use Plaintiffs' copyrighted music on an Internet music subscription service. (Panos Decl. Ex. 12.) The letter noted that:

[A]pplication of the mechanical license provisions of the Copyright Act (17 U.S.C. § 115) to the Service remains unresolved. Among other things, it is not clear whether operation of the Service might involve making and distributing [digital phonorecord deliveries ("DPDs")]. Submission of this application does not express or imply our agreement that a license is required for the operation of the [Internet] Service. We expect these issues to be addressed by industry negotiation or, if necessary, a Copyright Office proceeding. If it is determined that the operation of the Service involves the making and distribution of DPDs, we commit promptly to pay applicable royalties retroactive to the inception of the Service.

On November 22, 2000, UMG and other record labels, acting through the Recording Industry Association of America ("RIAA"), filed a petition with the Copyright Office to commence a rule-making proceeding in order to determine the applicability of Section 115 to streaming music through online services and the royalty rates to be paid for such activities.

On December 8, 2000, Plaintiffs commenced this litigation, arguing that Defendants' unauthorized copying of the musical compositions named in the complaint onto the Farmclub server was as infringing use of their copyrights. Defendants contend that they hold compulsory mechanical licenses for each work listed in the complaint as evidenced by HFA documents for each song and therefore have an absolute defense to the infringement claim. Plaintiffs respond that the licenses held by Defendants are limited to the express configurations and record numbers identified on the HFA documents.

#### **DISCUSSION**

Defendants argue that Section 115 "automatically" confers a licence when notice is timely served. In Defendants' view, the "automatic" nature of the license renders the piece of paper prepared by HFA nothing more than a confirmation of a compulsory licence and a variance of the statutory requirements of notice, accounting, and royalty payments for a particular phonorecord number. Thus, Defendants assert that by giving HFA notice of the intention to obtain a compulsory license for a particular song, they obtained compulsory licences for all of the works relevant to this litigation for all configurations, and the record number limitations contained in the HFA documents only apply to the variances for the statutory royalty and accounting terms. Plaintiffs respond that each HFA document is a license limited by



its express terms to a particular phonorecord number and configuration.

The problem with the Defendant's argument is that it ignores the fact that Defendant never served a notice of intent to acquire a compulsory license. Rather it submitted to the Harry Fox Agency a document entitled: "Mechanical License Request" on which it listed the catalogue number and format of the recording for which the license was sought. In response to this application, Defendant received a document entitled "License" which identified a specific "Record Number" and specific configuration for which the license was issued, e.g., "CD". The license stated, "Refer to provisions on reverse side varying terms of compulsory license provision of Copyright Act." As noted above one of those limitations is:

3. This compulsory license covers and is limited to one particular recording of said copyrighted work as performed by the artist and on the phonorecord number identified [on the front of the document]; and this compulsory license does not supersede nor in any way affect any prior agreements now in effect respecting phonorecords of said copyrighted work . . . .

Defendants contend that because the portion of the license which they signed stated "We acknowledge receipt of a copy hereof", they did not bind themselves to the terms set forth on the form. However, what they were acknowledging was that they received the license and were aware of its limitations. Since they received no broader license from any other source, their

rights were limited to those contained in the license they acknowledged receiving.

Even if one were to consider this licensing process in strict contract terms, Defendants' application for the license would constitute an offer which defendants accepted by sending the Harry Fox license. By signing the license acknowledging receipt of the terms upon which it was granted and, thereafter using the license, Defendants clearly manifested their assent to the terms on which the license was issued.

Defendants argument that the Harry Fox Agency had no authority to limit the license that could be obtained had they submitted a proper notice of intention to obtain a compulsory license is without merit. While this would be true had they chosen to submit such a notice, they did not do so; they submitted an application for a license to the Agency and they were bound by the terms of the license granted in response to that application. Nothing in Section 115 suggests that Congress intended to limit the ability of either copyright holders or prospective licensees to enter into private agreements that would contain different terms and conditions of the license. Indeed, Section 115(b)(2) expressly provides:

Failure to serve or file notice required by clause (1) forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement . . . .

See also § 115(c)(3)(B).

Thus Congress clearly recognized that those like Defendants who wished to obtain a license to include a copyrighted work in a phonorecord had a choice either to serve the notice required to obtain a compulsory license or to obtain a "negotiated license." Congress manifested no preference for either of these licensing methods. By choosing to submit a license application to Harry Fox rather than serve the statutorily required notice, Defendants exercised the option Congress granted them to obtain a "negotiated license." They are, therefore, bound by the terms they negotiated.

Defendants contention that the Harry Fox license is not limited to the particular album and configuration listed thereon is refuted by the document itself, as well as by the practice of the parties. Defendants do not dispute that they often obtained multiple HFA licenses for a particular composition. (Goodman Aff. Exs. 32-38.) Defendants argue that they notified HFA of the intent to distribute a new use of each composition in order to (1) obtain the variances for each use, (2) create a paper trail for royalty tracking purposes, and (3) accommodate HFA. One difficulty with this argument is that each of the HFA documents, received and acknowledged by Defendants with a signature, has a license number in the top right corner. The license number is different for each use of the song. Defendants dismiss this fact by pointing to the statute and the "automatic" nature of the license. According to Defendants, Plaintiffs could have put

whatever they wanted on the HFA document and Defendants were under no obligation to object because all of the rights of the parties are governed by the statute. This argument is particularly difficult to digest because the HFA documents obviously benefit Defendants in many ways, such as by making accounting and royalty payments due on a quarterly rather than monthly basis. More importantly, in many instances, the HFA documents set a royalty rate below the statutory rate. (Goodman Aff. Ex. 16.) Under Defendants' view, they were free to disregard any language on the HFA documents that they found contrary to the statute, but at the same time they could benefit from the variance from the statutory royalty rate and accounting requirements. Furthermore, under this theory Defendants could rely upon the HFA documents to prove that they had obtained a compulsory license for a particular musical composition, but Plaintiffs would be unable to rely on the document to establish the scope of the license. Such an argument defies common sense and finds no support in the statute.

The above construction of the Harry Fox license as limiting the license to a specific record and format is consistent with the the Second Circuit's decision in Fred Ahlert Music Corp v. Warner/Chappell Music, Inc., 155 F.3d 17, 24 (2d Cir. 1998).

In Ahlert, Judge Walker examined the scope of the derivative works exception of the Copyright Act, 17 U.S.C. § 304(c)(6)(A), in an effort to determine which music publisher had the right to

license the use of a 1969 Joe Cocker recording, a derivative work based on the copyrighted musical composition "Bye Bye Blackbird," for use on a movie soundtrack. See Ahlert, 155 F.3d at 19. The defendant, the copyright owner at the time the Joe Cocker derivative was recorded, had issued a mechanical licence that granted the A&M Record Company ("A&M") the right to make and distribute the 1969 recording. See id. Several year later, the defendant's copyright interest was terminated and transferred to the plaintiff. See id. at 20. The defendant argued that the use of the Joe Cocker derivative on the movie soundtrack fell within the derivative works exception to the Copyright Act and therefore the right to license the use of the song and collect royalties had not been transferred to the plaintiff with the copyright ownership. See id. at 20-22. Judge Walker determined that the ownership of the rights to the use of the Joe Cocker recording on the soundtrack turned on the terms of the original grant from the defendant to A&M. See id. at 24. Judge Walker found that:

[The mechanical] license [was] a narrow one granting A&M the right to use "Bye Bye Blackbird" for the limited purpose of recording the Cocker derivative and releasing it as "Record No. SP 4182". This grant does not authorize any additional releases of the Cocker derivative, much less its inclusion on a movie soundtrack.

Id. Thus, because the scope of the mechanical license was limited to the specific record number identified in the language of the licensing document, the release of the Joe Cocker

derivative on the sound track did not fall within the derivative works exception to the Copyright Act.

Defendants attempt to distinguish the Ahlert case because it did not involve an issue of infringement. However, the scope of the license to make and distribute phonorecords and the entitlement to mechanical royalties were the central issues in the case. The decision rested on the interpretation of the license as limited to a specific record. Defendants contend that the absence of an infringement claim made it unnecessary for Judge Walker to apply the Second Circuit's "interpretive rule" that a license should be construed broadly to include any uses which can reasonably be read to fall within the scope of the licence. See, e.g., ABKCO Music, Inc. v. Westminster Music, Ltd., 838 F. Supp. 153, 155 (S.D.N.Y. 1993). While it may be true that Judge Walker's opinion does not discuss the line of cases favoring this view of license interpretation, he clearly adopted the district court's analysis of the license. Defendants' own brief points out that the district court opinion, written by Judge Baer, did examine that line of cases. See Fred Ahlert Music Corp v. Warner/Chappell Music, Inc., 958 F. Supp. 170, 173 (S.D.N.Y. 1997). Indeed, Defendants even suggest that Judge Baer embraced this "expansive view" of licensing agreements. Whether such a statement is accurate or not, Judge Baer found that:

In those cases in which courts held that the scope of the license included uses not actually specified in the license, the license contained very broad language

wherein it was reasonable to assume the use fell within the scope of the license. . . . By contrast, the language here is very narrow and grants to A&M only the right to manufacture phonorecords of the Joe Cocker recording on Record No. SP 4182.

Id. at 173-174.

The language on the HFA documents is similarly narrow and is subject to the same analysis. As mentioned above, the HFA form states: "This compulsory license covers and is limited to one particular recording of said copyrighted work as performed by the artist and on the phonorecord number identified [on the document]." (Goodman Aff. Ex. 1.) Thus, the language of the HFA document is narrowly limited to a specific phonorecord number.

Defendants also argue that the license in Ahlert was a "voluntary contractual license," and that the decision did not discuss Section 115 compulsory licenses. First, it should be noted that the Ahlert mechanical license was issued in 1969 and therefore referenced Section 1(e) of the Copyright Act of 1909. (Panos Aff. Ex. 9.) Section 1(e) created the compulsory mechanical license, and as Defendants explained in their first brief, "[u]pon the effective date of the 1976 Act, all subsisting mechanical licenses obtained under the 1909 Act were converted into licenses under the 1976 Act and became subject to the provisions of Section 115." (Def. Mem. L. at 4 n.2 (citing Transitional and Supplementary Provisions of the Copyright Act of 1976, Publ. L. No. 94-533, § 106, 90 Stat. 2541.))

As mentioned above, the Ahlert license specifically stated that the license was granted in accordance with Section 1(e) of the Copyright Act of 1909, except that the accounting periods and royalty rate were varied. (Panos Decl. Ex. 9.) Thus, the Ahlert license was the equivalent of a compulsory mechanical license.

The major difference between the Ahlert license and the HFA documents is that the former is entitled "Copyright License Agreement" and states that the signature of the licensee on the documents "shall then constitute a binding agreement between the parties." (Panos Decl. Ex. 9.) The lack of a title on the HFA document is not particularly relevant because each HFA document has a distinct licence number on the top right corner indicating that it is a licence. There is also no heading that suggests that the document is a mere confirmation or variance. The "binding agreement" language in the Ahlert license is certainly stronger than the "we acknowledge receipt of a copy hereof" language appearing above the licensee signature on the HFA document. However, Defendants never rejected any of the HFA documents that they received on the basis of the record number and configuration limitations that appear on them. One instance of stronger language cannot overcome the many similarities between the Ahlert license and the HFA documents, including the reference to the compulsory license provision of the Copyright Act, the variance of the royalty rate and accounting period, and the limitation to a specific record number.



While Judge Walker did not analyze the mechanical license provision of the Copyright Act, the first mention of the mechanical license in Ahlert has an explanatory footnote that states: "A mechanical license allows the licensee to use a song in the manufacture and sale of phonorecords." Ahlert, 155 F.3d at 20 n.1. There was clearly no question what type of license was being interpreted. Moreover, Judge Baer's analysis, adopted by Judge Walker, focused on the interpretation of mechanical licences.

Even if it were not clear that Defendants' licenses are limited by the particulars set forth in the Harry Fox license, it appears that even a compulsory license would not permit Defendants to stream these copyrighted works over the Internet.

Section 115 states that "[a] person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use." 17 U.S.C. § 115(a)(1). Thus, while it may be that a compulsory license would permit Defendants to sell copies of the phonorecords at issue over the Internet, that is not what Defendants are purporting to do. Defendants place copies of various albums on the Internet and then allow computer users to listen to whatever songs on those albums they choose. They do not sell copies of the records to their users. Indeed, the user agreement which the Defendants require users of their service to accept, states: "you can't reproduce copy or distribute the Content by any means (including

but not limited to downloading or saving such Content to a computer hard drive) . . . ."

Thus the Defendants' server copies of the copyrighted works are not analogous to master recordings made in the course of the process of making phonorecords to be distributed to the public. Defendants concede that their server copies themselves are not for distribution to the public. (Def. Reply Mem. at 13.) Since Defendants' server copies are neither intended for distribution to the public nor part of a process for distributing digital copies of the existing phonorecords, Section 115 would not give the Defendants a right to a compulsory license for the server copies.

In a last ditch attempt to save a sinking ship, Defendants raise a number of specious arguments. First, Defendants argue that even if their motion for summary judgement is denied, factual issues preclude the granting of Plaintiffs' motion for partial summary judgement. This argument is particularly interesting coming from the party that at the outset of briefing argued that the HFA documents "may be construed by the Court as a matter of law," (Def. Mem. L. at 2), and that "the only fact material to resolution of defendants' motion is that defendants have licenses to make phonorecords embodying the compositions at issue." (Def. Mem. L. at 3.)

Defendants' argument that Plaintiffs are estopped from claiming infringement borders on the ridiculous. There is no

basis for a claim that Plaintiffs acquiesced in Defendants' conduct. Defendants do not dispute that Plaintiffs objected to the use of the songs at issue on Defendants' website within days of learning about the website. (Murphy Decl. ¶ 6.)

Defendants also argue that other licenses may exist supporting Universal's license rights to copyrights not identified in the complaint, but they did not produce any of these phantom documents. Defendants have admitted Plaintiffs' ownership and control of the songs at issue in this litigation (Defs. Rule 56.1 Counter-Statement ¶ 1), and based their right to use the songs on the Farmclub service on the HFA documents they submitted. Thus, this vague argument with no supporting evidence cannot create an issue of fact.

Defendants next argue that there is a material issue of fact as to whether they request new licenses for each new use of a particular musical composition. Whether or not this was done in every case, Defendants submitted multiple HFA licenses with different license numbers in support of their motion which indicates that they believed that such new licenses were required. Thus, the possibility that there is some dispute about industry practice does not impact granting summary judgement on the interpretation of the licenses offered by Defendants.

Defendants question whether the HFA licenses represent a conspiracy to restrain trade. This argument is frivolous since §

115(c)(3)(B) specifically exempts such negotiated licenses from the provisions of the antitrust laws.

Defendants also suggest that in the evolving world of Internet music, the Court should allow them to distribute music without paying royalties to Plaintiffs until the Copyright Office decides how to set royalty rates for Internet music services. The Second Circuit has recognized that "the Copyright Office has no authority to give opinions or define legal terms, and [that] its interpretation on an issue never before decided should not be given controlling weight." Morris v. Business Concepts, Inc., 259 F.3d 65, 71 (2d Cir. 2001) (quoting Bartok v. Boosey & Hawkes, Inc., 523 F.2d 941, 946-47 (2d Cir. 1975)). Nor is the Court aware of any authority that would give the Copyright office the authority to nunc pro tunc limit the plaintiffs rights to damages for the copyright violations committed by the Defendants prior to any change in the applicable rates. Thus, there is no reason to defer ruling on the pending infringement claim until the Copyright Office addresses the issues of mechanical licenses and royalties for Internet music.<sup>4</sup>

#### CONCLUSION

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<sup>4</sup> This argument seems particularly disingenuous because Defendants also filed an action in this Court to protect their sound recording copyrights from infringement in cyberspace. See UMG Recordings, Inc. v. MP3.COM, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

While Defendants have been less than candid with the Court, it is clear that what Defendants are attempting to do is to limit the payments due from them for the streaming of recordings of copyrighted works to their customers to the licensing fee that would be applicable when a radio station sends a recording over the airwaves. It is obvious that Defendants do not want to pay the Plaintiffs the license fee for a record every time one of their customers listens to recording on the Internet. However, the only license that Defendants rely on here is one that is limited to the distribution of records to the public for which there is an established fee. Defendants choice is to obtain a license for that purpose and pay the fee or cease their infringing activity. They can not avoid that liability by relying on the strained arguments they have asserted here.

For the reasons set forth above, Defendants' motion for summary judgement or to stay the proceedings is denied and Plaintiffs' cross-motion for partial summary judgment is granted.

**SO ORDERED.**

Dated: New York, New York

September \_\_, 2001

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JOHN S. MARTIN, JR., U.S.D.J.

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